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ORIGINAL MEANING AND THE DEATH PENALTY

BY JOHN STINNEFORD¹

Thank you so much for having me here today and thank you, Ms. Bishop, for that talk; that was really wonderful and inspiring.² I started my career as a visiting professor here at St. Thomas. Those were two of the best years of my life. It is not an overstatement to say that your faculty here taught me how to be a teacher and a scholar, and a person of faith as well, in many ways. It is a wonderful homecoming to be back here.

I would also like to share my own personal convictions before I move on to constitutional law, which is what I am going to talk about today. I am personally against the death penalty. I think it is a profound tragedy that it still exists, particularly because of the risk of executing the innocent. There is no way to eliminate this risk. I was a federal prosecutor myself for a while and at one point I discovered that we had charged an innocent person in a bank robbery case. Federal prosecutors have relatively small caseloads compared to state's attorneys, and lots of resources, and yet the only reason we found out before conviction that this person was innocent was pure accident – pure luck. If that is happening in the federal system, it is certainly happening in all the state systems. I do not think there is any way to eradicate it.

But I am going to talk today about a different question: Whether the death penalty is constitutional. The main thing that I write about, and think about, is the original meaning of the Cruel and Unusual Punishments Clause.³

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³ Jeanne Bishop, a public defender in Cook County, Illinois, provided a personal look into capital punishment at the University of St. Thomas Journal of Law and Public Policy's fall 2018 symposium, “THE DEATH PENALTY: A Dialogue on Morality and the Law.”

³ See, e.g., John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U.L. REV. 1739 (2008); John F. Stinneford, *Rethinking Proportionality under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899 (2011);

Today, I am going to look at the constitutionality of the death penalty from the perspective of original meaning. I do not think the death penalty itself is cruel and unusual within the original meaning of the Eighth Amendment, although certain applications of it certainly are.⁴ If the court paid closer attention to the original meaning of the Eighth Amendment, we would probably limit much of what we do.

Let me start by talking a little about what has happened in recent years – really since the early 2000s – with respect to the death penalty. In some ways, the Court has reached out to limit the scope of the death penalty. In recent decades, it has declared the death penalty to be cruel and unusual for mentally disabled offenders,⁵ for juvenile offenders,⁶ and for anyone convicted of a non-homicide offense against an individual.⁷ At the same time, the Court has twice upheld the constitutionality of lethal injection as a manner of execution.⁸ I am going to argue today that some of the Court's decisions limiting the death penalty may (or may not) be defensible from the perspective of original meaning. The decisions upholding lethal injection, on the other hand, are probably incorrect. Lethal injection is probably an unconstitutional method of punishment. The reasons it is unconstitutional shed a lot of light on what is wrong with our criminal justice system generally, so I will be talking about that in a little while.

Let me start by noting the difficulty of the problem that any court faces in deciding whether a punishment is cruel and unusual. The very purpose of punishment is to inflict pain. We are inflicting physical pain and psychological pain in retaliation for wrongdoing; that is what punishment is.

To decide that something is cruel and unusual, you have to figure out what the line is between constitutionally acceptable pain and unconstitutionally cruel pain. How do we draw that line? It is an extraordinarily difficult line to draw once you think about it as a legal matter. The court has adopted two diametrically opposite ways of trying to answer this problem. When Justice Scalia was alive, he represented an “originalist” perspective. He basically said, “If a punishment was okay in 1790, it must be okay today; that is how

John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 WM. & MARY L. REV. 531 (2014); John F. Stinneford, *The Original Meaning of "Cruel"*, 105 GEO. L.J. 441 (2017).

⁴ U.S. CONST. amend. VIII.

⁵ *Atkins v. Virginia*, 536 U.S. 304 (2002).

⁶ *Roper v. Simmons*, 543 U.S. 551 (2005).

⁷ *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

⁸ *See Baze v. Rees*, 553 U.S. 35 (2008); *Glossip v. Gross*, 135 S.Ct. 2726 (2015).

we figure out whether something is cruel and unusual.”⁹ Simply look at what they did in 1790, and if they did it then, they can do it today. He also took the position that there is no proportionality principle under the Eighth Amendment.¹⁰ That is to say, if a method of punishment was used for any crime in 1790, it can be used for an entirely different crime today. For example, if life imprisonment was available for murder in 1790, then we can use it today for shoplifting. He argued that courts should not ask whether a punishment is disproportionate to a given crime, but only whether the punishment is inherently cruel or barbaric.

The majority, on the other hand, has taken an explicitly non-originalist approach to the problem. They suggest the Eighth Amendment must draw its meaning from the evolving standards of decency that marked the progress of a maturing society.¹¹ The idea here is that every day and in every way society is getting kinder and gentler, and as society gets kinder and gentler, so too does the Eighth Amendment. We are not bound to the standards of 1790; we are bound instead to the standards of today.¹²

Now, notice that Justice Scalia’s “originalist” standard and the majority’s non-originalist standard are mirror images of each other, because each asks the Court to take a snapshot of public opinion at a given moment in time.¹³ Justice Scalia says the Court should take a snapshot of 1790; the majority says the Court should take a snapshot of today. I am going to argue that both of these methods of interpreting the Eighth Amendment are incorrect as a matter of original meaning. In fact, the second one does not even pretend to be correct.¹⁴ They are also unworkable. They do not really work in practice, and that is one of the reasons why the Cruel and Unusual Punishments Clause is so very weak today as a protection for criminal offenders.¹⁵

What are the problems with each of these approaches? The problem with Justice Scalia’s standard is that in 1790, punishments such as whipping, bodily mutilation, and the pillory were considered acceptable forms of punishment. Justice Scalia himself, shortly after he got on the Supreme Court, gave a famous talk at the University of Cincinnati law school, where he called himself a “faint-hearted originalist.”¹⁶ He said:

⁹ John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1766 (2008).

¹⁰ *Id.* at 1758 (citing *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991)).

¹¹ See *Trop v. Dulles*, 356 U.S. 86 (1958).

¹² *Id.*

¹³ Stinneford, *supra* note 8, at 1743.

¹⁴ U.S. CONST. amend. VIII.

¹⁵ *Id.*

¹⁶ See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862, 864 (1989).

What if some state should enact a new law providing public lashing, or branding of the right hand, as punishment for certain criminal offenses? Even if it could be demonstrated unequivocally that these were not cruel and unusual measures in 1791, and even though no prior Supreme Court decision has specifically disapproved them, I doubt whether any federal judge—even among the many who consider themselves originalists—would sustain them against an [E]ighth [A]mendment challenge...I hasten to confess that in a crunch I may prove a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging.¹⁷

Now, later in his career, he became less faint-hearted. He said,

“[W]hat I would say now is, yes, if a state enacted a law permitting flogging, it is immensely stupid, but it is not unconstitutional.”¹⁸ Despite Justice Scalia’s change of heart later in life, the fact that he himself would have trouble upholding his own standard in practice indicates that it may not be a very workable standard, may not be a very good standard.

What is the problem with the evolving standard of decency test? There are all sorts of problems with it. I am going to walk through some of them now. The first is the “Who decides?” problem. How do we figure out what current standards of decency are? Should the Court look to juries and legislatures? This might make sense because the jury is a cross section of the people, and the legislature is elected to represent the people. The Court has never limited itself to those two sources of information, however. Sometimes it looks to international opinion, sometimes to the opinions of professional associations, and sometimes to public opinion polls.¹⁹ Justices Brennan and Marshall famously looked to hypothetical public opinion – what would the public think if they only knew as much as we Supreme Court justices know?²⁰ So, it is hard to say what our sources of information about current standards of decency are. This is a particular problem, if you think about it, because anytime a death penalty case gets up to the Supreme Court, the punishment has been authorized by at least one legislature and imposed by at least one jury. Often, it has been authorized by many legislators and imposed by many juries.

¹⁷ *Id.* at 861.

¹⁸ See Marcia Coyle, *The Roberts Court: The Struggle for the Constitution* 165 (1st ed. 2013); Jennifer Senior, *In Conversation: Justice Scalia*, N.Y. MAG., Oct. 14, 2013, at 24.

¹⁹ Stinneford, *supra* note 8, at 1751.

²⁰ *Id.*

So, if the court were serious about relying on current societal attitudes, it would almost never strike down the death penalty or any other punishment, because the punishment has been authorized by the people and that is what the test is supposed to measure.

A second problem with this standard is that it ties in the meaning of the Eighth Amendment to current public opinion. Public opinion and individual rights are not like chocolate and peanut butter; they are not two great tastes that taste great together.²¹ They are more like oil and water; they should never mix. The reason we have a bill of rights is to protect unpopular people from public opinion when public opinion turns against them. It is hard to imagine a more unpopular group of people than criminal offenders, especially in death penalty cases.

The notion that the Eighth Amendment only protects criminal offenders when public opinion supports such protection is a perverse idea, and again, it is based on a very naïve and incorrect view of public opinion. As I said earlier, the evolving standards of decency test is based on the assumption that we are actually getting kinder and gentler over time as a society. That is not necessarily true. Sometimes we get kinder and gentler, but sometimes we get much harsher. In fact, anyone who has lived in the last forty years knows that we have had a series of public panics about crime in this country. In the 60s and 70s, it was crime rates generally. In the 80s, it was drug crime. In the 90s, it was juvenile super-predators. Today, it is sex offenders. Every time there is a public panic about a group of offenders, what do the legislatures do? They ratchet up the harshness of punishment to new and unprecedented levels.

Now, if the Court were to take the evolving standards of decency test seriously, the Court would have to approve all of the new cruelty – all the new harshness – because it is strongly supported by public opinion. It is a very problematic standard from that perspective, right? It is important to think about this when we think of ourselves as being so much better, and more advanced, than people were at the end of the 18th century, for example, because we do not use the pillory and that sort of thing.

But look at where we are. In 1970, there were 300,000 incarcerated people in this country, and today there are 2.25 million.²² Now if you look at just population growth, you would expect that 300,000 to become maybe 600,000 by today. Instead, we have 2.25 million. We incarcerate more

²¹ U.S. CONST. amend. VIII.

²² See E. Ann Carson, *Prisoners in 2016*, Bureau of Justice Statistics, NCJ 251149 (Jan. 2018), <http://www.bjs.gov/content/pub/pdf/p16.pdf>.

people in this country than any other country in the history of the world, so are we kinder and gentler? I think that is open to question.

The result of the Court's adoption of the evolving standards of decency test has been an Eighth Amendment jurisprudence that is both narrow and unprincipled.²³ It is unprincipled especially in its treatment of the death penalty. That is to say, the Court has reached out to limit the death penalty in a number of areas, but it had to do so by pretending to find a consensus against the punishment when no such consensus exists. For example, let's take the death penalty for non-homicide offenders. The case of *Kennedy v. Louisiana* was a case involving aggravated rape of a child, and the courts said you could not execute someone for aggravated rape of a child, despite the fact that there was a strong legislative trend towards authorizing this punishment.²⁴

Take a public opinion poll on that one. How many people do you think would be against the death penalty for those who commit aggravated rape against young children? I doubt you would find a majority of people against that punishment. So, the Court had to simply pretend that there is a consensus, and it did so in other death penalty cases as well. It is bad for the Court, bad for the Constitution, and bad for the rule of law when the Court pretends to find a societal consensus that does not really exist so that the Court can reach a result that it wants to reach.

On the other hand, with respect to sentences of imprisonment, the Court has basically taken an almost completely hands-off approach. It has done some things to protect juvenile offenders from life sentences without the possibility of parole,²⁵ but beyond that it has taken an almost completely hands-off approach. At the very moment prison sentences have become harsher than they ever were before, the Court said, "Do what you like, legislature; we are going to defer to you."²⁶ Now, why did they do that? Because again, the evolving standards of decency test would not really help.

The Court cannot simply pretend to find a societal consensus against a punishment in cases involving large numbers of offenders, because if the Court's decision resulted in large numbers of offenders being released, based on a blatantly made up Supreme Court finding, there would be a lot of political blowback against the Court. So, the Court simply leaves prison alone.

²³ U.S. CONST. amend. VIII.

²⁴ See *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

²⁵ See, e.g., *Miller v. Alabama*, 567 U.S. 460 (2012).

²⁶ See, e.g., *Ewing v. California*, 538 U.S. 11 (2003); *Harmelin v. Michigan*, 501 U.S. 957 (1991).

The death penalty is very important, but you need to understand that even at its height in modern times it was very, very rarely imposed, so the Court's death penalty decisions have protected maybe one one-thousandth of one percent of all felony offenders in this country. The other millions who come through the criminal justice system every year are completely unprotected. The evolving standards of decency test, in addition to being incorrect from an originalist perspective, simply does not work very well.

You might be thinking, "Well, what do we do Stinneford? It is easy to be a critic, right? You said that it is a hard problem. What is the solution?" I am glad you are all sitting down because it is a shocking one. The solution is to actually *read* the Constitution before you try to enforce it.

Particularly, take notice of the fact that the Eighth Amendment does not prohibit cruel punishments, but cruel *and unusual* punishments and both sides have ignored the word *unusual* in this debate.²⁷ The plurality opinion in *Trop v. Dulles*, the case that announced evolving standards of decency test, said:

Whether the word "unusual" has any qualitative meaning different from "cruel" is not clear. On the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn... These cases indicate that the Court simply examines the particular punishment involved in light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word "unusual."...If the word "unusual" is to have any meaning apart from the word "cruel," however, the meaning should be the ordinary one, signifying something different from that which is generally done."²⁸

Interestingly, Justice Scalia in *Harmelin vs. Michigan* – his big originalist opinion – did the same thing.²⁹ He asserted that it is unclear what unusual means, and that if it means anything, it means "[s]uch as is [not] in common use."³⁰ Both the originalists and the non-originalists largely ignored the meaning of the word. This makes sense in a way, because who cares how unusual a punishment is? It would seem that the more often you do something cruel, the worse it is. It may be cruel to torture only the worst sex offenders on only rare occasions. But if we were torturing every

²⁷ Stinneford, *supra* note 8, at 1824 (citing *Ewing*, 538 U.S. at 25).

²⁸ *Trop*, 356 U.S. at 100 n.32.

²⁹ *Harmelin v. Michigan*, 501 U.S. 957 (1991).

³⁰ *Id.* at 976.

shoplifter who came through the door, that seems to be a much worse thing to do.

So, why should we care about whether a punishment is “unusual” or not? We should care because the word does not mean what we have all thought it means. The word “unusual” in the Eighth Amendment does not mean rare or uncommon; it actually means contrary to long usage.³¹ In other words, it means new or innovative. When you hear “cruel and unusual,” think “cruel and new.” The word “unusual” is a common-law term that reflects the common law ideology underlying the Eighth Amendment and much of the Bill of Rights.³² I need to unpack this for a little bit. So, the students probably did not think you were going to get cold called, but let me cold call you. Tell me, what is the common law? What you were taught in law school that common law is? Judge-made law right? That is what I was taught in law school. That is what most people are taught today in all their first-year courses: judge-made law. Judges make the common law. This is an idea that we got largely from Oliver Wendell Holmes, who announced that the common law is simply judges making public policy from the bench based on their idea of what is good public policy.³³ But this is a lie. That is not what the common law was thought to be prior to Holmes. Critics of the common law claimed that judges really made law, but they made this claim in order to delegitimize the common law, because judges do not have the authority to make law. Contrary to the critics, common law thinkers said that the common law was a kind of customary law – the law of custom and long usage. Not judge-made law. So, the justification for the common law was never that the judges have the power to make the law.

Here is the idea behind the common law: for common law thinkers, there was the common law. It was out there, judges were using it, and they started thinking, “Well, how could the common law be law, because the king has never said, ‘Thou shalt or thou shalt not’?” Parliament has never said, “Thou shalt and thou shalt not.” Yet somehow it is still law, because the judges were applying customary rules in these cases. The idea behind the common law became that, when a legal practice is used for a very long time throughout the jurisdiction, this is evidence that it is reasonable and that it enjoys the stable multi-generational consent of the people. If it did not enjoy that, it would stop being used. So, the idea was that it was okay to have customary law and to enforce it in court, because long usage guarantees that it is reasonable and just and it enjoys the consent of the

³¹ See Stinneford, *supra* note 8.

³² *Id.* at 1745.

³³ Oliver Wendell Holmes, Jr., *The Common Law*, Project Gutenberg at 35, 36 (2013), <https://www.gutenberg.org/files/2449/2449-h/2449-h.htm>.

people. That is the idea behind the common law – customary law supported by long usage.

Now over time this developed into an idea that the common law was normatively superior to enacted law – that is, morally superior to enacted law. It tracks more closely to fundamental principles of justice because it does not become law until long usage has shown it to be good, whereas enacted law does not have the same guarantee of goodness. I think anyone who has any familiarity with laws passed by a legislature knows this to be true. There was that famous moment during the Obamacare debate when Nancy Pelosi said, “We have to pass the law before we can tell what is in it,” and everyone kind of laughed and mocked her about it, but in a way this is true of every law.³⁴ Even if you know what is in a law, once it gets passed and starts getting used, it often has unintended effects that are unjust or inconvenient.

Common law thinkers said that the common law is normatively superior to enacted law because long usage guarantees that its effects will be just and reasonable, whereas enacted laws enjoy no such guarantee. Now this is important because it developed into a further idea, which is the very idea of rights enforceable against the sovereign.³⁵ This is where the very idea of individual rights came from in the Anglo American system, because the notion was, since the common law is much more just and reliable than laws enacted by Parliament, the common law places some limits on what king or Parliament can do.³⁶ If they do something that undermines a fundamental right established by the common law, then this is not real law.³⁷ This is beyond their true authority. This is a mere active power and not law.³⁸

That is the idea behind individual rights: they come from the common law. Though this idea came from England, it never fully succeeded in England. England actually underwent a civil war between the King and Parliament that concerned, at least in part, whether the power of the sovereign could be constrained by the common law.³⁹ England ultimately settled on the absolute sovereignty of Parliament, which could not be constrained by the common law. But in America, the idea of common law limits on sovereign power caught on and held. The American Revolution itself was based on

³⁴ See Dan MacGuill, *Did Nancy Pelosi Say Obamacare Must be Passed to ‘Find Out What Is in It’?*, Snopes (Oct. 2017), <https://www.snopes.com/fact-check/pelosi-healthcare-pass-the-bill-to-see-what-is-in-it/>.

³⁵ Stinneford, *supra* note 8, at 1771-72.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Jane J. Ohlmeyer, *English Civil Wars*, Encyclopædia Britannica (Nov. 2018), <https://www.britannica.com/event/English-Civil-Wars>.

this idea. When the sovereign tried to tax us without giving us representation in Parliament, tried to take away the right to a jury trial, et cetera, the refrain was, “You can’t do that, because you are violating rights established through long usage, established through common law.”

So, the idea now – I hope you are getting the idea here – is that this is our baseline for understanding whether a given governmental action is just or unjust. Does it violate rights established through long usage? You may say, “That is great about the common law, but how do we know that the word ‘unusual’ means contrary to long usage?” I said “unusual” is something that violates rights established through long usage. But how do we know that is what the term means?

We know what “unusual” means largely because of a man named Titus Oates. Now in 2005, Oates was voted the worst Briton of the seventeenth century and the third-worst Briton of the past thousand years.⁴⁰ He is a bad guy, but he is actually one of my favorite people, because he helps us understand what cruel and unusual means. Let me tell you the story of Titus Oates.

Oates was a disreputable seventeenth century Anglican clergyman.⁴¹ He had fallen on hard times, he had had trouble with the law, and he started thinking, “How can I get fame and fortune?” He was sort of a Kardashians of his era. He wanted fame and fortune and he thought, “Well, people do not like Catholics very much. Everyone is always worried that the Spanish Armada is going to come sailing up the Thames. If I make up a story about a Popish plot to kill the king and I name the conspirators, everyone will love me because I have saved the monarchy, and I will have fame and fortune!” So, he does that. He makes up a story about a Popish plot to kill the king.⁴² He goes to a magistrate in London and gives evidence about this plot.⁴³ Ten days later, the magistrate turns up dead in the streets of London.⁴⁴ So, it is a panic now. Everyone is panicked – the Catholics are coming, the Catholics are coming.⁴⁵ They have a series of trials of all the conspirators that Oates named: trial, conviction, execution; trial, conviction, execution. One after the other until we get to the final trial, at which point Oates’ story falls apart.⁴⁶ Oates had claimed to witness a key meeting of the

⁴⁰ ‘Worst’ historical Britons list, BBC News, (Dec. 2005), <http://news.bbc.co.uk/2/hi/uk/4561624.stm>.

⁴¹ Stinneford, *supra* note 8, at 1760.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

conspirators in England on a certain date. It turns out that Oates was actually in France – you know, drinking some wine and eating cheese – on that day and that the whole story had been made up.⁴⁷ It all fell apart.⁴⁸

Now the question was, “What do we do with Titus Oates?” If you think about Titus Oates, he is like a serial killer, right?⁴⁹ But he is worse than a typical serial killer, because the typical serial killer has some kind of psychological compulsion.⁵⁰ But Oates just wanted fame and fortune, and he was willing to kill innocent people to get it. So, what do we do with Oates? The problem was that, as a legal matter, the only crime he had committed was perjury, which was a misdemeanor.⁵¹ You cannot execute him for perjury, so what do you do with Oates? By the way, this is all public record; you can read the trial of Titus Oates.⁵² So, he gets convicted of two counts of perjury, and at sentencing, the judges say, “Well, Mr. Oates, this is a misdemeanor so we cannot take your life and we cannot take your limb, but we have something special prepared for you.”⁵³ That is close to the actual language – “We have something special prepared for you.” Here is what they had prepared for him.

They fined him two thousand marks, which was a very large fine.⁵⁴ They had him flogged while being dragged across the city of London from Aldgate to Newgate, and then two days later, just as the wounds started healing, he was once again flogged while being dragged across the city of London from Newgate to Tyburn.⁵⁵ Many people think the hope was that he would be flogged to death, but like a cockroach in a nuclear war, he survived.⁵⁶

He was also sentenced to pillorying four times a year for life.⁵⁷ You are looking at an actual woodcarving of Oates in the pillory.⁵⁸ They used to make these woodcarvings, and they would print postcards and sell them.⁵⁹

⁴⁷ Stinneford, *supra* note 8, at 1760.

⁴⁸ *Id.*

⁴⁹ See Leonard G. Johns, *et al.*, *Serial Murder: Multi-Disciplinary Perspectives for Investigators*, Federal Bureau of Investigations (Robert J. Morton ed.), <https://www.fbi.gov/stats-services/publications/serial-murder#two>.

⁵⁰ *Id.*

⁵¹ Stinneford, *supra* note 8, at 1760.

⁵² See, e.g., *Second Trial of Titus Oates*, 10 How. St. Tr. 1227, 1314 (K.B. 1685).

⁵³ *Id.* (as quoted by Justice Scalia, “we have taken special care of you”).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See John Simkin, *Titus Oates*, Spartacus Educational, (Aug. 2014), <https://spartacus-educational.com/STUoates.htm>.

⁵⁹ *Id.*

Oates was also sentenced to life imprisonment and he was defrocked.⁶⁰ That was the punishment inflicted on Titus Oates. Now, this all happened in 1685, under Charles II.⁶¹ Charles II died a few years later.⁶² He was succeeded by his brother, James II, who was a Catholic.⁶³ People did not like him very much, and they eventually ran him out of town. They invited William and Mary to come over and become the new king and queen of England.⁶⁴ Parliament said to William and Mary, “We would like you to be our new sovereign, but before you come, we have come up with this thing called ‘the Bill of Rights.’ We would like you to sign it, and if you sign the Bill of Rights, we will make you king and queen.”⁶⁵ Of course, William and Mary were already measuring the drapery at Windsor Palace, and so they were like, “Sure!” They signed it and it became law, and who showed up in Parliament the very next year but Titus Oates.⁶⁶

Again, you can read all of this. You can read the parliamentary debates about this.⁶⁷ Oates showed up he said, “Hey, good job on that Bill of Rights. By the way, I noticed that it prohibits cruel and unusual punishments. It just so happens that the punishment inflicted on me was cruel and unusual. Will you please suspend the judgment?” There was a big debate about it in Parliament, and if you read the debates, it is very clear that a majority in Parliament believed that his punishment was cruel and unusual.⁶⁸ In fact, members of the House of Commons said that they were thinking specifically of Oates when they wrote the cruel and unusual punishments clause that appeared in the English Bill of Rights initially.⁶⁹ Most importantly, they gave the reasons they believed Oates’s punishment was cruel and unusual: They said it was “contrary to law and ancient practice,” it was without precedent, and it would create a bad precedent for the future.⁷⁰ It was unprecedented, contrary to ancient practice, and therefore cruel and unusual.

⁶⁰ *Id.*

⁶¹ *Titus Oates*, Encyclopædia Britannica (Sept. 2018), <https://www.britannica.com/biography/Titus-Oates>.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Bill of Rights*, Encyclopædia Britannica, (Aug. 2018), <https://www.britannica.com/topic/Bill-of-Rights-British-history>.

⁶⁵ *Id.*

⁶⁶ *Harmelin*, 501 U.S. at 970-71.

⁶⁷ *Id.* (citing 1 *Journals of the House of Lords* 367 (May 31, 1689), quoted in *Second Trial of Titus Oates*, *supra*, at 1325.)

⁶⁸ See *Harmelin*, 501 U.S. at 970-71.

⁶⁹ *Id.* (citing 10 *Journal of the House of Commons* 247 (Aug. 2, 1689)).

⁷⁰ *Id.*

Parliament did not suspend the judgment against Oates because the House of Lords just hated him so much, they could not do it.⁷¹ There is an actual quote where they say “[s]o ill a man” should not get the benefit of the Bill of Rights.⁷² But even though Oates lost, the debate over Oates’s punishment shows what it means for a punishment to be cruel and unusual: It must be unjustly harsh in light of longstanding prior practice. By the way, Titus Oates’s case contradicts Justice Scalia’s claim that a punishment has to involve an inherently cruel or barbaric method of punishment to be cruel and unusual. All of the punishments inflicted on Oates except defrocking were acceptable under the common law at the time.⁷³ Even if you added them all up together, the absolute level of harshness was not as great as some punishments that were inflicted for other crimes at the time. For example, for treason you could get drawn and quartered, which is very, very gruesome and painful.⁷⁴ Compared to drawing and quartering, Oates’s punishment could not be considered inherently cruel or barbaric. It is clear that if Oates’ punishment was cruel and unusual, it was because it was disproportionate to the crime of perjury. It was unprecedented as a punishment for this sort of offense. So, in England, clearly proportionality was part of the analysis.

Now you might be thinking, “Well okay, that is fine, but that is England. Didn’t we have a revolution to get away from them? Why should we think that the cruel and unusual punishments clause in the Eighth Amendment means the same thing that it did in England?” In fact, there is a lot of evidence of this. I have written an article about it – if you have trouble sleeping, it is a great sleep aid.⁷⁵ Both in the run up to the revolution and also during the debate over the Constitution, Americans regularly use the word “unusual” to mean contrary to the common law, unprecedented, or innovative.⁷⁶ For example, the Virginia House of Burgesses sent a letter to the King of England complaining that British efforts to deny Americans the right to a jury trial were “unusual” – meaning new, unprecedented.⁷⁷ Similarly, in the debate over the Constitution, the framers associated innovation in punishment with the adoption of the civil law practices of Europe.⁷⁸ They worried that if Congress was not bound to follow the common law, it might decide to follow the example of the Spanish

⁷¹ Stinneford, *supra* note 8, at 1761.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Drawing and Quartering*, Encyclopædia Britannica, (Nov. 2018), <https://www.britannica.com/topic/drawing-and-quartering>.

⁷⁵ See Stinneford, *supra* note 8.

⁷⁶ Stinneford, *supra* note 8, at 1770.

⁷⁷ *Id.* at 1771.

⁷⁸ *Id.*

Inquisition and impose torture, which is prohibited by the common law. The cruel and unusual punishments clause was designed to prevent that from happening. Patrick Henry famously criticized the entire federal government as a series of “new and unusual experiments.”⁷⁹

It is quite clear historically that the Eighth Amendment was meant to serve as a check on Congress’s ability to deviate from the common law tradition. We do not want government innovating punishment in a way that is significantly harsher than prior punishment practice would permit. What does this mean? I told you Justice Scalia said we should look at a snapshot of 1790 to figure out whether a punishment is permissible. The evolving standards of decency test asks us to look at snapshot of current practice.⁸⁰ The actual original meaning asks us to look at longstanding prior practice – that is, it directs us to ask what the tradition has been up to today and how this new punishment we are trying to impose compares to the punishments that have traditionally been imposed for a given crime.

What would the effect of adopting this standard be on current Eighth Amendment jurisprudence, and in particular the death penalty?

First of all, the original meaning of the Cruel and Unusual Punishments Clause precisely reverses the evolving standards of decency test. Instead of asking “Does this traditional punishment still meet our current standards of decency?” the courts should be asking, “Does this new punishment meet our traditional standards of decency?” That is the idea. Underlying this is the idea that we most need to worry about cruelty when there is some kind of public panic that has driven the government to feel that it needs to get tough on crime, to show that it is in control. That is when we are most likely to see cruel punishment and that is when we need courts to intervene to prevent it from happening. That is the basic idea behind the original meaning of the clause.⁸¹

Second, this standard is distinct from Justice Scalia’s standard, because the common law incorporates a doctrine called “desuetude,” which says that if a practice falls out of usage for a significant period of time, then it is considered to be no longer part of our tradition.⁸² The idea is it has not survived the test of time and therefore, if you introduce it now, it is just like introducing new punishment. The mere fact that we mutilated people in 1790 does not mean we can do so today, and the mere fact that we executed

⁷⁹ *Id.*

⁸⁰ *Id.* at 1765-1766.

⁸¹ U.S. CONST. amend. VIII.

⁸² Stinneford, *supra* note 8, at 1765 (citing Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989)).

people for crimes like counterfeiting in 1790 does not mean we can do so today. These punishments fell out of usage long ago. They are no longer part of the tradition. If you bring them back, you should not compare them to the practices of 1790, but to the tradition as if it has survived up to today.

Third, as I noted earlier, it is quite clear that the clause incorporates a proportionality principle. I did not talk much about the American side of that today, but I have written a whole article on the topic so if you are interested, you can read it.⁸³ Disproportionate punishments are a form of cruel and unusual punishment.⁸⁴

Now, what does this say to us about the death penalty? It says several things, I think. First of all, to the extent the death penalty has survived continuously over time, it cannot plausibly be characterized as cruel and unusual. It is not new or innovative, and thus does not come within the prohibition of the Eighth Amendment.

Several once-traditional applications of the death penalty may now be cruel and unusual, however. For example, it is probably unconstitutional to execute someone for counterfeiting, even though this punishment was inflicted for this crime in the 1790s, because this application of the death penalty did not survive the test of time.

Also, many state constitutions have their own cruel and unusual punishments clauses.⁸⁵ Usage is jurisdiction specific, so if a given jurisdiction eliminated the death penalty a long time ago, and then tried to bring it back, you might be able to say, “Well, this is cruel and unusual under the constitution of this state, because this is not a part of our state’s tradition – even though it may not be cruel and unusual as a federal matter.” This is one area where many state constitutions may be more protective than the federal constitution.

The final point I want to make has to do with methods of punishment, using lethal injection as an example. Lethal injection is, in many ways, a window into American punishment practices generally. The public perception of lethal injection is that it is just like putting an animal to sleep: You give the offender an injection, they go to sleep and never wake up. That is the public perception of lethal injection. But this is not how it actually works.

⁸³ See John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 WM. & MARY L. REV. 531 (2014).

⁸⁴ John F. Stinneford, *The Original Meaning of “Cruel,”* 105 GEO. L.J. 441, 472 (2017).

⁸⁵ IND. CONST. art. 1, § 16.

Lethal injection typically involves a three-drug cocktail.⁸⁶ One of those drugs, until recently, has been a barbiturate. If you give someone a massive overdose of barbiturates, he will go to sleep and never wake up. That is how animals are euthanized. But lethal injection does not involve just barbiturates, it also involves a heart stopping agent and a paralyzing agent.⁸⁷

Let us talk for a minute about why lethal injection involves all three drugs. To get there, I think we need to talk a little bit about the history of the methods of execution in this country. Traditionally – if you look at the nineteenth century, for example – executions were often performed by methods such as hanging or the firing squad. These were methods that, if done properly, would kill someone quite quickly, and I believe relatively painlessly, but they were gruesome. They were public in the nineteenth century.⁸⁸ Every now and then, there would be a botched execution and people watching the execution would be really angered and repulsed by what they saw. There are occasions in the nineteenth century where people would try to lynch the executioner when the executioner would botch an execution.⁸⁹ So, how did the state respond to this? First, the state moved executions into the prison yard and then, finally, inside the prison.⁹⁰

Now, the reason that has been given publicly, and what you may have all been told, is that this was done to prevent the coarsening of public opinion.⁹¹ We do not want people to enjoy watching someone die. Maybe that is part of it, but I do not think it was the driving reason. I think the driving reason for making executions private was to eliminate public revulsion against executions. If you just read about an execution, you are not going to get especially upset. You are much less likely to be angry even to read about a botched execution.

Then what did we do? We adopted different methods of execution, each of which was supposed to be more scientific and less cruel than the ones that came before.⁹² We went to electrocution when electricity was new.⁹³ It was supposed to be painless, but it turns out that it was not. It was gruesome and often painful. There were also more botched electric chair executions than

⁸⁶ Note, *A New Test for Evaluating Eighth Amendment Challenges to Lethal Injections*, 120 Harv. L. Rev. 1301 (2007).

⁸⁷ *Id.*

⁸⁸ *Id.* at 981.

⁸⁹ Stinneford, *supra* note 83, at 488-489.

⁹⁰ Kate Esther Rapp, *The Statutory Implications of the Public's Right to View Executions: A State by State Analysis*, 34 MISS. C. L. REV. 288, 295 (2015).

⁹¹ *Id.*

⁹² *Id.*

⁹³ See Robert J. Cottrol, *Finality with Ambivalence: The American Death Penalty's Uneasy History*, 56 STAN. L. REV. 1641 (2004).

there had been for hangings.⁹⁴ Over time, it became clear that this was problematic, so we switched to the gas chamber.⁹⁵ The gas chamber, too, was supposed to be painless, but actually often caused a gruesome death. It also took a long time – sometimes fifteen minutes or more – for a person to asphyxiate in a gas chamber.⁹⁶ Then we finally came up, in the 1970s, with lethal injection.⁹⁷

Why the three-drug cocktail? The problem with barbiturates was that they took too long. It could take forty-five minutes or an hour for someone to die.⁹⁸ The state thought, “We need to be able to speed up the process, we need it to happen fast.” So, the barbiturates were combined with a heart-stopping agent, was supposed to kill the offender quickly.⁹⁹ But there are two problems with the heart-stopping agent. One is that if you are not fully unconscious, it is an extraordinarily painful way to die. It is like being burned to death from the inside, like having battery acid poured into your veins. Now, barbiturates are supposed to take care of that. You are supposed to be asleep. But if you do not have enough barbiturates, or they are not properly administered, you are going to feel excruciating pain. The other problem with the heart-stopping agent is that it causes convulsions. Even if the offender is fully unconscious, he or she will flip around on the table and would appear to be in a lot of pain.¹⁰⁰ The state did not want that. They wanted it to look like the offender is going to sleep. So, they also give the offender a paralyzing agent.¹⁰¹ The paralyzing agent makes sure you do not move at all.

Now, there are two problems with a paralyzing agent. One of those problems is that if the barbiturates are not properly administered, then death by paralyzing agent is also extremely painful, because it is like being asphyxiated. Your lungs stop working, but your brain keeps working, so you feel as though you are drowning.¹⁰² Now imagine drowning and being burned to death from the inside at the same time. That is what it is like if you are not fully unconscious. The barbiturate is supposed to solve that problem, but of course there is the risk that it might not be properly administered. You might not be fully unconscious. Of course, because of the paralyzing agent, so if you are conscious and you are feeling every bit of it, we do not know because you have been paralyzed. You cannot

⁹⁴ *Id.*

⁹⁵ *Id.* at 1657.

⁹⁶ *Id.*

⁹⁷ *Id.* at 1658.

⁹⁸ *Id.*

⁹⁹ See Stinneford, *supra* note 8.

¹⁰⁰ Jeremy Kohler, *Behind the Mask of the Execution Doctor*, St. Louis Post-Dispatch, July 30, 2006, at A1.

¹⁰¹ *Id.*

¹⁰² See Stinneford, *supra* note 8.

register any physical reaction to the pain you are experiencing. This is the problem now.

Lethal injection is also an extraordinarily complex procedure. It involves three different drugs, and proper administration requires skill and expertise. Generally speaking, doctors do not want to be involved, so the procedure is performed by prison officials. The states also often compartmentalize the process so that there is nine or ten different people involved in different stages of the process so no one feels too responsible for the death. But there can be a mistake during any one of those stages, and the compartmentalization makes the mistake harder to discover.¹⁰³ And so, what you end up having is a great risk of a botched execution.

There is a recent study showing that lethal injections are botched at more than twice the rate of hangings, for example – more than twice the rate.¹⁰⁴ This is just the botched executions that we know of. If lethal injection is botched, remember, the offender is tortured to death. This is what we are doing with respect to lethal injection.

In short, lethal injection appears to meet the criteria for a cruel and unusual punishment under the original meaning of the Eighth Amendment.¹⁰⁵ It is a new method of punishment and is significantly harsher than traditional methods like hanging. Now, you might ask yourself, “Why are we doing it this way? Why are we using a three-drug cocktail?” I think the answer is aesthetics. We are doing it so that we can feel better about ourselves as a society, and the state can minimize public reactions against the death penalty. If you can hide from public view the fact that you are violently killing someone – and that is what we do every time we execute someone – then the public will not react against the death penalty. Now, we have moved executions out of the public square, inside the prison yard, inside the prison, and even inside the prison where we are using drugs to hide the nature of what we do to make it look better – more antiseptic so that there is no public reaction against the death penalty.

I think this is the big problem, because under the original meaning of the Eighth Amendment, the idea is that over the long term you can rely on public opinion to eliminate cruel methods of punishment. That is the supposition underlying the clause, but of course public opinion can only be relied upon to eliminate cruel punishments if the public knows what is happening. The public should have some basis of assessing whether

¹⁰³ See Kohler, *supra* note 99.

¹⁰⁴ Robert Weaver, *Botched Execution and the Struggle to End Capital Punishment: A Twentieth-Century Story*, 38 LAW & SOC. INQUIRY 694, 700 (2004).

¹⁰⁵ U.S. CONST. amend. VIII.

something is cruel and unusual or not. Currently, the public does not have that basis because the state does everything it can to hide executions from public view.

This is my final point. In a way, lethal injection is a microcosm of the entire criminal punishment system in this country. Starting in the beginning of the nineteenth century, we moved from largely public punishments – think of Titus Oates in the pillory – to private punishments, where we take you and we put you in a prison cell. That seems nicer. Less degrading and less humiliating. But once you are inside the prison cell, we cannot see you. We cannot see the suffering that you are undergoing. So, the legislature says, “Hey, let’s change the punishment for burglary from two years in jail to five years, to ten years, to twenty years.” The public can rarely see the increased harshness, the increased pain, increased suffering, and the increased cruelty of that punishment. I think that is one of the reasons that it was so easy over the last forty years to ratchet up the harshness of punishment, to the point where we now incarcerate more people than ever before, because the public just cannot see it.

That is a significant problem. I do not know the solution to it. I think the work of the Innocence Project, and the work that Ms. Bishop is doing, has been extremely effective in reducing the death penalty, at least in some states. But I think if we want to be truly effective in showing the public what is cruel about our system and what needs to be changed, we need to find a way to let the public see it.

Thank you very much.